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Diplomatic protection

Comments and observations received from Governments

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I. Introduction

In a communication dated 1 August 2006, the Government of Kuwait transmitted a set of comments and observations on the draft articles and commentaries on diplomatic protection, adopted by the International Law Commission, on first reading, at its fifty-sixth session, in 2004.[1] The Commission did not have the opportunity to consider the comments and observations, as they were received after the adoption of the draft articles on second reading.

II. Comments and observations received from Governments

Kuwait

A. The legal nature of diplomatic protection

1. Whenever an ordinary individual is unable to obtain his rights, he induces the State to which he belongs by virtue of his nationality to take up his defence and institute legal action against the State that is at the origin of the internationally wrongful act. Such intervention on the part of the State is known under the rules of State responsibility as "diplomatic protection of nationals abroad".

Such intervention transforms a conflict between an individual and a State into a dispute between sovereign States and removes the individual from the realm of the dispute. He has to wait for the judgment to be rendered in his case at the international level, so that his State may turn over to him what it has obtained in the way of compensation from the State bearing the international responsibility. His State itself, moreover, has been harmed as a result of the insult to its national.

Kuwait therefore concludes that diplomatic protection is part of State responsibility, i.e., one of its main topics, and also an international instrument for the protection of human rights against violations involving a wrongful act by another State or, as decided by the International Law Commission, diplomatic protection is simply one means of protecting human rights (paragraph 84 of the seventh report of the Special Rapporteur (A/CN.4/567)).

2. Waiver of diplomatic protection

On the basis of the considerations referred to in section 1 above, an individual does not have the right to waive the right of his State to protect him, for in such a case he would be waiving a right that is possessed not by him but rather by his State. Furthermore, what is involved here is a human right that has been violated by another State through a wrongful act on its part. Such rights are inalienable and therefore not subject to waiver. Moreover, they belong to jus cogens, which cannot be derogated from by agreement.

[1] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 59.

3. Discretionary right of States to exercise diplomatic protection

During its discussion of draft article 2, the International Law Commission decided not to impose any obligation on States to exercise diplomatic protection, in application of the rule taken from international case law that the exercise of such protection is a right of the State, whence it may make use or not make use that right.

4. Exhaustion of local remedies

Exhaustion of local remedies by the injured person as a precondition for the exercise of diplomatic protection is a constant and firmly established rule of customary international law, as affirmed and decided by the International Court of Justice in the *Interhandel* case of 1959.

This rule rests on two considerations, the first of which is respect for the sovereignty of the foreign State in whose territory the individual is living, his subjection to the national jurisdiction of that State and the assumption that such jurisdiction is unbiased and neutral. The second consideration can be summed up in the granting of an opportunity to the State which committed the act to remedy it by the State's own methods and within the framework of its domestic law.

The Commission has dealt with this requirement, which is governed by articles 14, 15 and 16 of the draft.

5. Nationality requirement

Established State practice requires that a nationality link should exist between the individual and the State at two points in time at least: the first is the time of occurrence of the internationally wrongful act and the coming into being of the injury, and the second, the date of official presentation of the claim for protection, either by the diplomatic channel or by way of international jurisdiction.

Exhaustive discussions among States are taking place within the Commission regarding continuity of nationality (draft articles 3 to 10 deal with the question of the existence of nationality, article 5 dealing specifically with continuous nationality) as a fundamental condition for a State's exercise of diplomatic protection.

The most controversial aspects of the continuity of nationality rule pertain to the final date on which the person having suffered the injury must still be a national and to whether, in that regard, it is the date of official presentation of the claim or the date of the final decision on the claim and the rendering of the related judgment that must be taken into account.

A look at the international position on the matter shows that a number of States support the first approach, favouring continuous nationality up to the date on which the claim is presented internationally, whereas there is strong objection to this view on the part of the United States of America, which considers it necessary for nationality to continue to the date of the resolution of the claim.

The United States relies heavily on the decision of the Arbitral Panel of the International Centre for the Settlement of Investment Disputes in the case *The Loewen Group Inc. v. the United States of America*, which ruled that in the language of international law, "there must be continuous national identity from the date of the events giving rise to the claim", which is the date known by the expression "the time

of the occurrence of the injury", "through the date of the resolution of the claim", which is known as the "final date".

Paragraphs 35 to 46 of the seventh report on diplomatic protection

Whatever the opinion may be concerning the said award, on which the United States of America has relied in its position that nationality must continue until the date of resolution of the international claim for diplomatic protection, Kuwait views that position as appropriate and in keeping with legal and practical criteria and sees the wisdom of diplomatic protection itself.

Indeed, it is neither acceptable nor reasonable for a State to continue to shower its diplomatic protection on someone who has lost the nationality whereby he belonged to it, not to mention the fact that diplomatic protection, as we have stated, rests on two considerations, namely the right of the State and the right of the person offended against by the internationally wrongful act. In the event that the latter's nationality ends, the right of the State to continue its diplomatic protection ceases, for the person is no longer its national. What is more, such protection represents an international claim forbidden to individuals by virtue of the fact that they are not international persons, who alone have the right to institute proceedings of that kind.

As to the argument that such continuity is not necessary, on the grounds that the new State to which the injured person will belong will exercise diplomatic protection on his behalf, this does not weaken, but rather strengthens, the view that continuity of nationality is necessary, if one considers that the new State will resume the prosecution of the international action for diplomatic protection. The matter is different during the period between the injured person's loss of the nationality of his original State and his acquisition of the nationality of another State. Such is also the case when the new State fails to afford diplomatic protection to an injured person who has acquired its citizenship, inasmuch as the exercise of the right of diplomatic protection — as previously pointed out — is a discretionary right of the State, i.e., one that it may, at its option, either exercise or refrain from exercising.

With regard to the above presentation and examination of the legal nature of diplomatic protection, it is Kuwait's intention — in addition to making its contribution to this international effort — that these principles should have an impact on the draft articles being prepared by the United Nations International Law Commission.

B. Draft articles

The proposed draft includes 19 articles whereby the International Law Commission, at its fifty-eighth session, regulated some aspects of diplomatic protection in international law, namely nationality and the exhaustion of local remedies. It did not, however, take up the primary rules of diplomatic protection, i.e., the rules governing the treatment of aliens; nor did it deal with the consequences arising from diplomatic protection, such as the question of determining whether there is an obligation on the successful claimant State to pay over any compensation it may have received in respect of the claim to the injured national. This is a question that is taken up in the concluding part of the seventh report.

Kuwait will now take up the draft articles in succession, in accordance with the following points:

1. **Article 1**

The first paragraph of the proposed amended version of the article defines "diplomatic protection". The second paragraph refers to the distinction between diplomatic protection and consular assistance, stating that the former should not be interpreted as including the exercise of the latter, based on the considerations propounded in the seventh report, i.e., correct theoretical and practical considerations to which we refer the reader in the interest of conciseness and to avoid repetition.

2. **Article 2**

The text of this article, after being amended, affirms the right of the State to exercise diplomatic protection in accordance with the provisions of the draft articles.

In this regard, we refer the reader to the observations made above by Kuwait concerning the State's right to exercise such protection as one of the aspects of the legal nature of diplomatic protection.

3. **Articles 3 to 8**

These articles govern the provision of protection by the State of nationality to natural persons, including multiple nationals, as well as to stateless persons and refugees.

Kuwait considers that article 4 should be redrafted to include the expression "determined by the law of the State", inasmuch as questions of nationality still belong exclusively to States.

Concerning the continuous nationality rule (draft article 5), we refer the reader to the remarks made above in that regard, in connection with the discussion of the legal nature of diplomatic protection.

Apart from these points, Kuwait agrees with the drafts of the said articles worked out by the Commission.

4. **Articles 9 and 10**

Draft articles 9 and 10 govern aspects of diplomatic protection for legal persons relating respectively to the State of nationality of a corporation and continuous nationality of a corporation.

(a) Article 9: State of nationality of a corporation

Kuwait agrees with the wording of article 9 following the proposed amendment of its second paragraph and the deletion of the phrase "or some similar connection" appearing at the end of the paragraph, so that it reads as follows:

> **For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was**

formed and in whose territory it has its registered office or the seat of its management,

on the grounds that the said phrase, if included in the paragraph, would open the door wide to various interpretations and give rise to confusion regarding its construction, apart from being obscure and lacking precision.

(b) Article 10: Continuous nationality of a corporation

The wording of paragraph 2 of this article (paragraph 3 of revised article 10) reads as follows:

Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and which, as the result of the injury, has ceased to exist according to the law of that State.

The word "exist", included in the text, may be imprecise and give rise to numerous difficulties and problems of interpretation inasmuch as established practice has it, according to the rules in force in most (civilized) States regarding the continued existence of corporations or the cessation thereof, that the corporation's legal personality continues to exist even after the corporation's dissolution — either by consent or by decree — until the satisfaction of all creditors' claims, either in full or, in the case of insufficient assets, in part, and in accordance with the details laid out in the legal rules governing the liquidation of corporations.

Kuwait therefore proposes amending the phrase "and which, as the result of the injury, has ceased to exist according to the law of that State" to read "and which, as the result of the injury, no longer has legal personality and has been totally liquidated, according to the law of that State".

5. Article 11

With regard to the phrase "The corporation has ceased to exist", which appears in the text both before and after revision, Kuwait refers the reader to its previous comments concerning the existence of the corporation and proposes that the text be redrafted, with the phrase "The corporation has been liquidated and its legal personality has lapsed" substituted for the aforementioned existing phrase.

6. Article 18

Kuwait proposes substituting the phrase "bilateral and multilateral treaties" for the phrase "special treaty provisions", with a view to clearly defining the meaning and in accordance with the notion of treaties.

7. The right of the injured national to receive compensation adjudged

The established principle on which international practice used to be based required that international reparation for injury was always owed to the State and not to the individual, even in the case of compensation and despite the fact that the amount of compensation must be determined on the basis of the damage suffered by the individual. In modern times, however, this principle has come under examination in many States, which acknowledge that there is some obligation on them to disburse compensation received to the injured national and that the injured

individual in whose interest the claim was raised should benefit from the exercise of diplomatic protection.

Considerations of equity and respect for human rights have compelled the Commission seriously to contemplate adopting a provision on this subject as an exercise in progressive development and thus removing one of the major sources of inequity of diplomatic protection. It has thus drafted language, with which Kuwait agrees, calling for the transfer of the sum turned over to it by way of compensation for the injury in fulfilment of a claim arising out of diplomatic protection to the national in respect of whom it has brought the claim, after deduction of the costs incurred by the State in so doing.